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24 **ATTORNEYS FOR OPT-OUT PLAINTIFFS**

26 **UNITED STATES DISTRICT COURT**
27 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
28 **SAN FRANCISCO DIVISION**

IN RE: CHRYSLER-DODGE-JEEP
ECODIESEL MARKETING, SALES
PRACTICES, AND PRODUCT
LIABILITY LITIGATION

MDL DOCKET NO.
3:17-md-02777-EMC

This Document Relates to:

Mark Franey, et al. vs. FCA US LLC,
et al. No. 3:18-cv-00061;

Nicholis Duncan, et al. vs. FCA US LLC,
et al. No. 3:18-cv-05646;

Joseph Sandavol, et al. vs. FCA US LLC,
et al. No. 3:18-cv-00961;

Davis Williams, et al. vs. FCA US LLC,
et al. No. 3:18-cv-00595;

Charles Cox, et al. vs. FCA US LLC,
et al. No. 18-cv-06306;

Roger Lucas, et al. vs. FCA US LLC,
et al. No. 3:18-cv-06308;

Noel Aamot, et al. vs. FCA US LLC,
et al. No. 3:18-cv-03288;

Donald Hunter, et al. vs. FCA US LLC,
et al. No. 2:19-cv-10345;

Bill Beneker, et al. vs. FCA US LLC,
et al. No. 2:19-cv-10344;

Marion Lathem, et al. vs. FCA US LLC,
et al. No. 3:18-cv-00421;

David McFarland, et al. vs. FCA US LLC,
et al. No. 3:18-cv-06148;

Ronald Kimbrell, et al. vs. FCA US LLC,
et al. No. 3:19-cv-00451;

Thomas Rawlings, et al. vs. FCA US LLC,
et al. No. 3:19-cv-00452;

1 *Robert Acevedo, et al. vs. FCA US LLC,*)
 2 *et al. No. 3:19-cv-00453;*)

3 *Robert Acevedo, et al. vs. FCA US LLC,*)
 4 *et al. No. 3:19-cv-00453;*)

5 *Andrew Rogers, et al. vs. Fiat Chrysler*)
 6 *Automobiles N.V., et al., No. 3:18-cv-07760;*)

7 *Bryan Schneider, et al. vs. Fiat Chrysler*)
 8 *Automobiles N.V., et al., No. 3:19-cv-00788;*)

9 *David Kelly, et al. vs. Fiat Chrysler*)
 10 *Automobiles N.V., et al., No. 3:19-cv-03019;*)

11 **OPT-OUT PLAINTIFFS' RESPONSE**
 12 **TO DEFENDANTS' REQUEST FOR SETTLEMENT PROCESS**

13 The law firms of Heygood, Orr & Pearson ("HOP") and Patrick Law Firm, P.C. ("Patrick")
 14 (collectively, "HOP/Patrick") and Michael J. Melkersen, P.C and Stern Law, PLLC (collectively,
 15 "Melkersen/Stern") file this Response to address the request by Defendants for a court-ordered
 16 settlement process, as set forth in the Joint Case Management Statement. (Dkt 585 at 3.) Plaintiffs
 17 support the concept of a court-ordered settlement process, but there are a host of problems with
 18 the procedure proposed by Defendants. Defendants' proposed process is an unprecedented, one-
 19 sided, burdensome procedure that is nothing more than a transparent attempt to coerce Plaintiffs
 20 into opting back into the Class Action Settlement while at the same time impermissibly invading
 21 the attorney-client relationship and requiring the disclosure of confidential settlement discussions.
 22 Making matters worse, Defendants want this procedure to go forward while discovery remains
 23 stayed, thus depriving Plaintiffs of critical information needed for productive settlement
 24 discussions. Plaintiffs support a settlement process that is open and fair, but Defendants' process
 25 is far from that and should be rejected by the Court.
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DEFENDANTS' POSITION

Defendants request that the Court continue to stay all litigation and order a settlement process that requires each opt-out Plaintiff to make “specific, individualized settlement demands in writing to the FCA and Bosch Defendants respectively and to explain the basis for the amounts sought, including by category of damages.” (*Id.*) According to Defendants, these written demands “should explain why the opt-out has suffered more in damages than would be available to the particular opt-out if the opt-out participated in the class settlement, and taking account of the fact that the AEM is available to current owners and lessees (including opt-outs) free of charge, and there has been no decline in the value of the Subject Vehicles.” (*Id.*) Defendants further request that Counsel for Opt-Out Plaintiffs be required to “provide a representation that counsel has explained to the client what benefits they could receive under the class settlement and the justification for their demand in excess of that amount.” (*Id.*) Finally, Defendants request that a magistrate judge be appointed to oversee the process. (*Id.*)

PLAINTIFFS' POSITION

A. Defendants’ settlement process is unprecedented, one-sided, and impermissibly invades the attorney-client relationship.

Defendants’ settlement process is, at bottom, nothing more than an attempt to punish Plaintiffs who have exercised their legal right to opt out of the class action settlement and coerce them into opting back into the class. It is one thing to request that Plaintiffs be ordered to provide itemized damages (which, as discussed below, is incredibly premature), but it is a wholly different matter to demand that each and every Plaintiff explain why that person “has suffered more in damages than would be available to the particular opt-out if the opt-out participated in the class settlement, and taking account of the fact that the AEM is available to current owners and lessees (including opt-outs) free of charge, and there has been no decline in the value of the Subject

Vehicles.” (Dkt. 585 at 3.) Plaintiffs are unaware of any court that has ordered each plaintiff who has chosen to opt out of a class action to explain why he or she has rejected the class settlement offer as inadequate. (As will be discussed below in more detail, little explanation is even needed given the significant problems with the AEM that are being reported.) Nor are Plaintiffs aware of any court order that has required a plaintiff, in responding to a settlement offer, to accept at face value a defendants’ self-serving characterization of the benefits of their own settlement offer. The entire purpose of this exercise is simply to pressure Plaintiffs to take the class action settlement and taints Defendants’ proposed settlement process.

Compounding the problem is the fact that Defendants want to invade the attorney-client relationship between Plaintiffs and their counsel by demanding that Plaintiffs’ counsel “provide a representation that counsel has explained to the client what benefits they could receive under the class settlement and the justification for their demand in excess of that amount.” (*Id.*) Defendants, of course, provide **no** authority for the proposition that a court may order such a disclosure of confidential settlement communications between an attorney and his or her client, and the one-sided nature of Defendants’ request only underscores its absurdity. Notably, Defendants do not propose that their counsel be required to provide similar representations to the Court. Defendants do not propose, for example, that for each individualized settlement demand they receive, their counsel be required to provide a representation to the Court that their counsel has communicated to the relevant decision maker(s) for each Defendant:

- The potential judgment that the specific Plaintiff could recover at trial under the Plaintiff’s relevant state consumer protection law;
- The potential recovery at trial of attorney’s fees, as well as statutory and/or punitive damages, by that specific Plaintiff;
- The potential cost of litigating that specific Plaintiff’s lawsuit through trial;

- The justification for why that specific Plaintiff's settlement demand should be rejected in light of the potential judgment that the Plaintiff could recover at trial and the potential cost of litigating that specific Plaintiff's lawsuit through trial.

The truth is that Defendants would be outraged if Plaintiffs demanded such an intrusion into their attorney-client settlement discussions, and their demand for such an intrusion into Plaintiffs' attorney-client settlement discussions is similarly outrageous. The Court should reject Defendants' proposed process for this reason alone.

B. The Court should allow Kenneth Feinberg, who has already been appointed Settlement Master of this MDL, to oversee the settlement process.

Plaintiffs submit that Kenneth Feinberg should be allowed to oversee the settlement process as opposed to a magistrate judge. The Court already appointed Mr. Feinberg as Settlement Master in this MDL, and no party objected to him, (Dkt 184), most likely because he is one of the most preeminent settlement masters in the country. Mr. Feinberg is already familiar with this litigation and thus can bring an expertise and credibility to the settlement process.

Moreover, Mr. Feinberg has experience with auto emissions cases and, more specifically, the undersigned Plaintiffs' Counsel. In the Volkswagen MDL, Mr. Feinberg helped the undersigned Plaintiffs' Counsel mediate and resolve all of their opt-out cases after multiple rounds of settlement discussions supervised by a magistrate judge had not been successful. In short, the Court should continue to place its trust in Mr. Feinberg to handle the settlement of claims in this MDL by allowing him to oversee a settlement process for opt-out Plaintiffs.

C. The Court should lift the stay on discovery.

Defendants want Plaintiffs to provide a detailed itemization of damages but, as of the date of this filing, discovery has been completely stayed as to opt-out Plaintiffs. Plaintiffs have had no discovery on liability, the technical aspects of the defeat devices, the extent of Defendants' knowledge and culpability, or the effectiveness of their proposed AEM. Defendants know full

1 well that Plaintiffs will retain experts to establish economic damages and that those experts will in
2 turn need to rely on the fact discovery generated in this litigation to form their opinions as to
3 damages. Without the benefit of discovery, the type of precise damage calculations demanded by
4 Defendants are not practical.

5 It is true that Judge Breyer recently entered an order in the Volkswagen MDL that required
6 the remaining opt-out Plaintiffs to fill out detailed fact sheets on damages.¹ But the Volkswagen
7 litigation was at a much more developed stage and those fact sheets were ordered for the purpose
8 of selecting bellwether trials. Even though discovery had been stayed in the federal Volkswagen
9 MDL, Plaintiffs' counsel for the majority of opt-out plaintiffs had been pursuing claims against
10 the Defendants in concurrent state court litigation in Texas, Virginia, and California for years and,
11 as a result, had obtained significant discovery. Plaintiffs' counsel in the Volkswagen litigation
12 had been provided access to, and had sufficient time to review, the document repository established
13 by the PSC and Defendants. Plaintiffs' Counsel had also participated in depositions of Defendants
14 and were provided additional deposition transcripts. Moreover, Plaintiffs' Counsel had been
15 through numerous court ordered and supervised rounds of settlement discussions. In other words,
16 by the time Judge Breyer ordered detailed fact sheets on damages (similar to what Defendants
17 demand), the factual record was much more developed and the parties had already been through
18 multiple rounds of settlement conferences. Given the disparate posture of the instant cases,
19 Defendants' requested itemization of damages is premature.

25 ¹ Judge Breyer did not order, as Defendants request, that the Plaintiffs "explain why the opt-out
26 has suffered more in damages than would be available to the particular opt-out if the opt-out
27 participated in the class settlement" or require "counsel provide a representation that counsel has
28 explained to the client what benefits they could receive under the class settlement and the
justification for their demand in excess of that amount." (Dkt 585 at 2.) It is not difficult to see
why as such an order would impermissibly invade the attorney-client relationship.

D. Discovery on the AEM is particularly critical given the evidence that the AEM significantly impacts the mileage, performance and acceleration of the Subject Vehicles and may present a serious safety hazard to drivers.

The importance of conducting discovery on the AEM, including its effect on the Subject Vehicles' mileage and performance, cannot be understated and is becoming more critical with each passing day. The AEM was made available to consumers several months ago and already NHTSA is receiving numerous, serious complaints about the AEM's effect on mileage, performance, and acceleration. Indeed, consumers are reporting that that AEM's effect on vehicle acceleration is so significant that it poses a safety hazard, and many consumers report almost getting into accidents as a result. (Attached as Exhibit A is a table setting forth NHTSA complaints that Plaintiffs' counsel has located to date.) Below is a sampling of those complaints:

- AFTER THE EMISSIONS RECALL, MY JEEP HAS DANGEROUS LAG ON ACCELERATION. YOU PRESS THE GAS PEDAL AND THERE IS A 3-5 SECOND DELAY BEFORE ANYTHING HAPPENS. VERY DANGEROUS WHEN PULLING OUT OF MY DRIVEWAY ETC. ADDITIONALLY THE FUEL ECONOMY HAS DECREASED SUBSTANTIALLY. (Exhibit A at 1.)
- WAS ADVISED TO TAKE TRUCK IN FOR RECALL REFLASH DUE TO ECO DIESEL SETTLEMENT PACKAGE. AFTER RECALL FIX WAS CONDUCTED, ENGINE SLUGGISH, SHIFTING NOT SMOOTH AND MILES PER GALLON DROPPED SIGNIFICANTLY. ALL THIS AFTER A TRIP OF 8 HOURS AT LEGAL SPEED LIMITS. (*Id.* at 8.)
- RAM FLASHED THE COMPUTER ON MY TRUCK TO COMPLY WITH THE DIESEL EMISSIONS LAWSUIT. WHEN I LEFT THE DEALERSHIP AFTER THE FLASH AND TRIED TO ENTER THE TRAFFIC LANE THE TRUCK BARELY RESPONDED TO THE THROTTLE. THERE WAS A HUGE DELAY AND IF NOT FOR A PULL OFF AREA I WOULD HAVE BEEN IN AN ACCIDENT. HOW THEY GOT THIS FLASH APPROVED MAKES ME WONDER WHAT IS GOING ON WITH PROVIDING SAFETY IN A VEHICLE. I CONSIDER WHAT THEY DID TO MY TRUCK CRIMINAL. (*Id.* at 12.)
- AFTER UPDATE TO RESOLVE THE EMISSIONS RECALL ISSUE (ECODIESEL SETTLEMENT), MY TRUCK HAS DANGEROUSLY POOR RESPONSE TO ACCELERATION. IT IS A LIFE SAFETY ISSUE. AFTER THE INITIAL UPDATE, I

HAD TO BRING THE TRUCK IN A SECOND TIME BECAUSE THE EMISSIONS UPDATES RUINED THE EMISSIONS SENSORS. LEAVING THE DEALERSHIP, I PULLED OUT INTO TRAFFIC ON A STATE HIGHWAY WITH PLENTY OF ROOM (AT LEAST 200 FEET) AND AFTER HITTING THE ACCELERATOR, THE VEHICLE STALLED FOR APPROXIMATELY 5 SECONDS BEFORE FINALLY RESPONDING, NEARLY CAUSING THE VEHICLE BEHIND ME TO RUN INTO THE REAR. IF THIS ISSUE IS NOT RESOLVED, PEOPLE ARE GOING GET KILLED ON THE HIGHWAY. (*Id.* at 14.)

- 2014 RAM ECODIESEL - I RECENTLY HAD MY AEM RECALL COMPLETED AT AN AUTHORIZED DEALER WITH THE PROMISE THAT PERFORMANCE AND FUEL MILEAGE WOULD NOT BE AFFECTED. NOT ONLY WERE THEY BOTH NEGATIVELY AFFECTED, THEY WERE AFFECTED TO THE POINT OF A SAFETY CONCERN. MY GAS MILEAGE GOING DOWN BY OVER 5MPG IS NOTHING COMPARED TO ALMOST GETTING T-BONED BY ONCOMING TRAFFIC DUE TO EXTENSIVE TURBO LAG (2-3 SECONDS) AFTER THE AEM WAS COMPLETED. THIS HAS HAPPENED MORE THAN ONCE WHEN I GO TO MAKE A LEFT TURN FROM A DEAD STOP, PRESS THE ACCELERATOR, AND THE TRUCK JUST SITS THERE. LUCKILY THERE HAS BEEN A SHOULDER FOR ME TO SWERVE INTO TO GET OUT OF THE WAY FROM BEING REAR-ENDED. THE 0-60 TIME WHILE ENTERING THE FREEWAY ON RAMP IS ALSO CAUSE FOR CONCERN. MULTIPLE TIMES I HAVE HAD A FELLOW DRIVE LAY ON THEIR HORN BECAUSE THE TRUCK JUST CANNOT GAIN SPEED FAST ENOUGH. NOW, IF I WERE GETTING BETTER GAS MILEAGE WITH THE DECREASE IN PERFORMANCE, THAT WOULD BE ONE THING. BUT TO GET SIGNIFICANTLY WORSE GAS MILEAGE AND HAVE THIS DEATH BOX NOT ACCELERATE WHEN THE ACCELERATOR IS PRESSED IS JUST AWFUL. FCA HAS LIED TO THEIR CONSUMERS WITH THIS UPDATE AND SHOULD NOT BE ALLOWED TO HAVE THAT RECALL INSTALLED ON VEHICLES. (*Id.* at 9.)

The above samples are representative of complaints about the AEM and reveal that there is a consistent, significant problem with the AEM and its impact on performance, mileage, and acceleration. Many additional complaints are listed in Exhibit A.

The complaints being received by NHTSA are not the only complaints being made. Plaintiffs' Counsel has received numerous complaints from clients who had the AEM performed on their vehicles without their permission, and the complaints are similar to those that have been lodged with NHTSA. Moreover, comments in customer forums indicate that customers are

1 suffering the same problems and have even raised the issue with the PSC. Below is one example
2 from a Dodge Ram customer forum:

3 Hi,

4 I just spoke with one of the class action attorneys who is following up on
5 the AEM complaints. The attorneys WILL take this issue to
6 the Department of Justice, the government body that negotiated the
7 settlement with FCA to complain that the guarantees to the consumer have
8 not held up in terms of mpg, power, drive-ability, etc. if there is critical mass
and documentation. It won't be quick but they will advocate for consumers
even at this point in the process if we truly have been harmed by the fix.

9
10 They need hard evidence in terms of written statements from service
managers, dealers, etc. They need numbers showing what has been lost.

11 I have more than a few verbal admissions that my truck is not ok from the
12 dealer. I hope it will be memorialized in writing somehow through the tests,
13 the star case, etc.

14 If you truly feel impacted by the AEM and you can describe the difference
15 in your truck in a convincing way that can probably be documented
16 somehow, I urge you to call the attorneys and leave a message. It will help
everyone.

17 415-956-1000 - ask for the attorneys handling the class action settlement.
18 You will probably get voicemail but I had a nice attorney call me back
19 within a day or two. He was kind and reasonable, took notes and was
interested in what I had to say.

20
21 Thanks

22 [https://www.ram1500diesel.com/forum/fca-epa-3-0l-diesel-settlement-aem-approved-emissions-
24 modification/64784-new-thread-class-action-attorney-asking-hard-evidence-aem-problems.html](https://www.ram1500diesel.com/forum/fca-epa-3-0l-diesel-settlement-aem-approved-emissions-
23 modification/64784-new-thread-class-action-attorney-asking-hard-evidence-aem-problems.html)

25 Attached as Exhibit B is a table setting forth customer complaints about the AEM that Plaintiffs'
26 counsel has located. Attached as Exhibits C, D, and E are articles discussing reported customer
27
28

1 problems with the AEM. Finally, below is a link to a YouTube video detailing numerous customer
2 complaints with the AEM: <https://youtu.be/2MmSUAOwpRY>

3 As shown above and in the tables attached, the number of customer complaints about the
4 AEM is significant. With the growing chorus of safety complaints about the AEM, there is a
5 critical need for discovery on the AEM, including its effectiveness, its impact on the Subject
6 Vehicles' mileage, power, performance, and acceleration, and Defendants' knowledge of
7 complaints and/or deficiencies with the AEM. In short, there is a critical need to lift the stay and
8 allow discovery by the opt-out plaintiffs to proceed.
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Respectfully Submitted,

/s/ Charles Miller

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ATTORNEYS FOR OPT-OUT PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2019, I filed the foregoing from the Service List and a copy of has been served on all Parties required to be served by electronically filing with the Clerk of the Court of the U.S. District Court for the Northern District of California, San Francisco Division, by using the CM/ECF system.

/s/ Charles Miller
CHARLES MILLER